ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2003

No. 02-1153

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 161,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

JAMES F. BLANDFORD
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424
(202) 482-6620

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the United States Department of the Treasury, United States Customs Service, Port of New York and Newark (Customs) and National Treasury Employees Union, Chapter 161 (NTEU). The NTEU is the petitioner in this court proceeding; and the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *United States Department of the Treasury, United States Customs Service, Port of New York and Newark and National Treasury Employees Union, Chapter 161*, Case No. 0-AR-3384, decision issued on March 20, 2002, reported at 57 F.L.R.A. 718.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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*Authorities upon which we chiefly rely are marked by asterisks.

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on March 20, 2002. The decision and order is published at 57 F.L.R.A. 718 (2002). A copy of the slip opinion is included in the Joint Appendix (JA) at 119-125. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1]

Although this Court has jurisdiction to review the Authority's final decisions and orders resolving exceptions to arbitrators' awards where such awards involve an unfair labor practice (ULP), 5 U.S.C. § 7123(a)(1), this Court does not have

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[1] Pertinent statutory provisions are set forth in Addendum (Add.) A to this brief.

jurisdiction over the instant petition because petitioner's contentions were not urged before the Authority. 5 U.S.C. § 7123(c); *Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986) (*EEOC*) (exhaustion requirement of § 7123(c) is jurisdictional in nature).

STATEMENT OF THE ISSUES

I. Whether this Court lacks jurisdiction over the instant petition because petitioner's contentions were not urged before the Authority as required by 5 U.S.C. § 7123(c).

II. Assuming the Court has jurisdiction over the petition for review, whether the Authority properly set aside an arbitrator's award.

STATEMENT OF THE CASE

This case arose as an arbitration proceeding conducted pursuant to § 7121 of the Statute and the collective bargaining agreement (cba) between the United States Customs Service (Customs) and the National Treasury Employees Union (parent union). The National Treasury Employees Union, Chapter 161 (NTEU), an agent of the parent union that represents Customs employees at Port Newark/New York, had filed a grievance alleging that Customs violated the cba and the Statute by unilaterally discontinuing the practice of routine vessel boarding by Customs inspectors. After the arbitrator held that Customs had violated both the cba and the Statute as alleged, Customs filed exceptions with the Authority pursuant to § 7122 of the Statute. On exceptions, the Authority determined that the arbitrator had erred in his determination and set aside the award.

NTEU seeks review of the Authority's decision and order pursuant to 5 U.S.C. § 7123(a) of the Statute.

STATEMENT OF THE FACTS

I. Background

This case arose when a Customs facility in Port Newark/New York temporarily discontinued the practice of having Customs inspectors board vessels on overtime. Prior to the events of early 1999 that precipitated this case, Customs Inspectors routinely boarded every vessel entering the port, regardless of whether overtime work was involved. Although Congress had eliminated in 1993 the statutory requirement that all vessels be boarded, Customs had continued the practice pending resolution of related issues with the parent union. Customs and the parent union negotiated a National Memorandum of Understanding (National MOU) that was scheduled to go into effect on January 1, 1998. The National MOU left certain matters for local negotiations, and such negotiations began in Port Newark/New York later that year. Using the dispute resolution procedures provided in the National MOU, an agreement between Customs Port Newark/New York and NTEU was completed in February 1999. JA 68-69. However, neither the National MOU nor the related local agreement became effective until agency regulations upon which the agreements depended were made final on February 18, 2000. JA 120.

Sometime in March 1999, during the course of a discussion on unrelated matters, Assistant Area Director John Leyland, a Customs management official in Port Newark/New York, informed Larry Tanacredi, President, NTEU, that the Port was having problems funding overtime. JA 26, 87. Subsequently, on April 1, 1999, before the national and local agreements became effective, Mr. Leyland sent a letter to Mr. Tanacredi stating that due to financial problems, effective April 15, 1999, the routine boarding of vessels during overtime hours would stop until the end of the fiscal year. JA 69. The letter provided a point of contact, should NTEU have

questions or “wish to discuss” the matter. JA 10. On April 26, 1999, routine boarding of vessels on overtime ceased and did not resume until October 1, 1999. JA 70.

Subsequent to the April 1, 1999, letter, NTEU never requested to negotiate over the change in boarding procedures. JA 85. Instead, on April 19, 1999, NTEU filed a grievance over the “unilateral implementation of a non-negotiated Boarding Policy.” In the grievance NTEU sought a return to the previous boarding practice and back pay for affected employees. JA 11. The parties were not able to resolve the grievance and the matter was submitted to arbitration. JA 61.

II. Arbitrator's Opinion and Award

As relevant here, Customs argued before the arbitrator that NTEU had waived any right to bargain over the change in boarding procedures.[2] The basic rule, acknowledged by the arbitrator (JA 83), is that a union can waive its right to bargain by failing to request bargaining when an agency has given it adequate notice of a change in conditions of employment. *See Bureau of Engraving and Printing, Washington, D.C.*, 44 F.L.R.A. 575, 582 (1992). Customs contended that it provided NTEU with adequate notice of the change and cited testimony of NTEU's president that he never requested bargaining. JA 83-86.

The arbitrator focused on the notice issue and held that NTEU did not waive its right to bargain because Customs had not provided NTEU with "adequate, sufficient, or specific" notice of its intent to change the boarding practice. JA 88. Although noting that the April 1, 1999, letter was “sufficiently specific as to Customs’ plan for action, including a time frame for implementation which could have facilitated [NTEU's] request for impact and implementation bargaining,” the

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[2] Customs put forth other arguments contending that it had no obligation to bargain that were also rejected by the arbitrator. These determinations were uncontested before the Authority, and are not at issue before the Court.

arbitrator determined that because of the "ambiguous context in which the communication was conveyed," the letter was not a "clear and unequivocal" notice that Customs was providing NTEU an opportunity to bargain. JA 91. The arbitrator discussed in this connection the union president's misunderstanding of Customs' notice. *See* JA 88-90. Having found that NTEU had not received adequate notice of the proposed change, it was unnecessary for the arbitrator to reach the additional issue, namely whether NTEU had acted to preserve its bargaining rights.

The arbitrator also rejected NTEU's contention that Customs' action was a repudiation of the National MOU or the local agreement on Boarding Policy. The arbitrator found that because the relevant Customs regulations had not been issued, the agreements were not in effect at the time Customs changed its boarding practice.[3] JA 93.

As a remedy for Customs' unilateral change, the arbitrator ordered compensation for lost overtime pay under the Back Pay Act, 5 U.S.C. § 5596. However, given the absence of relevant data, the arbitrator made only an interim award, retaining jurisdiction in order to enable Customs and NTEU to provide additional information. JA 104. After the parties' submission, the arbitrator issued a final order awarding a total of $146,502 in back pay.[4] JA 117.

III. The Authority's Decision and Order

The Authority set aside the arbitrator's award. Focusing on the notice issue, the Authority held that the arbitrator misapplied relevant Authority precedent when

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[3] NTEU did not except to this determination before the Authority.

[4] Before the Authority, Customs challenged the back pay remedy on a number of grounds. The Authority set aside the remedy only on the ground that there was no violation of law or contract to justify an award of back pay. JA 125. Thus, the Authority did not address Customs' additional specific objections to the remedy.

he determined that Customs did not provide NTEU with adequate notice of its decision to change conditions of employment relating to vessel boarding.

Citing *United States Army Corps of Engineers, Memphis District, Memphis, Tenn.*, 53 F.L.R.A. 79, 82-83 (1997) (*Corps of Engineers*), the Authority first addressed the relevant standards for determining the adequacy of notice. The Authority noted in this connection that the agency bears the burden of demonstrating that notice to an exclusive representative of a proposed change in conditions of employment is "sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining." JA 122. The Authority held that any notice "must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change" (citing *Corps of Engineers*, 53 F.L.R.A. at 83). *Id.*

Applying these requirements to the instant case, the Authority held that Customs gave NTEU adequate notice regarding the agency's proposed discontinuation of overtime vessel boarding. The Authority found in this regard that the April 1, 1999, letter to NTEU explained that effective April 15, 1999, due to financial problems, the routine boarding of vessels during overtime hours would stop until the end of the fiscal year. Accordingly, the Authority concluded that the letter conveyed to NTEU the scope and nature of the proposed change, the certainty of the change, and the planned implementation date – all of the requirements listed by the Authority in *Corps of Engineers*. JA 122-23.

The Authority rejected the arbitrator's view of adequate notice. Specifically, the Authority held that the arbitrator misapplied statutory notice requirements when he concluded that, in the circumstances of this case, Customs was required to provide NTEU with "clear and unequivocal notice," including "an unequivocal

communication that the Agency intended to breach or unilaterally change the local agreements generated pursuant to the National MOU[.]" Instead, the Authority held that the notice given by Customs to NTEU satisfied the statutory standard. Conversely, the Authority held that the arbitrator's determination, based on NTEU's president's confused state of mind, was inconsistent with law because it established a different standard from that set forth in the Statute. JA 123.

Having determined that Customs provided NTEU with adequate notice of the impending change, the Authority next considered whether NTEU waived its bargaining rights. The Authority referenced its precedent, holding that a union is deemed to have waived its bargaining rights if it fails to request negotiations after receiving adequate notice from the agency of a planned change in a past practice (citing *Corps of Engineers*, 53 FLRA at 82). Given NTEU's concession that it had not made a bargaining request (JA 85), the Authority concluded that NTEU waived its right to bargain over the change in boarding policy. Accordingly, the Authority set aside the arbitrator's decision that Customs violated § 7116(a)(1) and (5) of the Statute. JA 123.

The Authority resolved the contractual notice issues in the case also by reference to the statutory standard, noting that under Authority precedent statutory standards are appropriately applied in assessing the application of contract provisions that mirror provisions of the Statute (citing *United States Dep't of Justice, Fed. Correctional Facility, El Reno, Okla.*, 51 F.L.R.A. 584, 589 n.5 (1995)). Accordingly, the Authority held that the arbitrator's finding of a contractual violation was deficient for the same reasons the Authority rejected the arbitrator's finding of a statutory violation. JA 124-25.

Finally the Authority set aside the back pay portion of the award as well, noting that absent a statutory or contractual violation there was no basis upon which to support such an award. JA 125.

STANDARD OF REVIEW

NTEU's petition for review, based on the grounds set forth in its brief, is not properly before the Court pursuant to 5 U.S.C. § 7123(c). Should the Court review the merits of the Authority's decision, however, the standard of review of Authority decisions is narrow: Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. §§ 7123(c) and 706(2)(A); *Overseas Educ. Ass'n v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988); *EEOC v. FLRA*, 744 F.2d 842, 847 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *see also Fort Stewart Sch. v. FLRA*, 495 U.S. 641 (1990).

Factual findings of the Authority that are supported by substantial evidence on the record as a whole are conclusive. 5 U.S.C. § 7123(c); *Nat'l Treasury Employees Union v. FLRA*, 721 F.2d 1402, 1405 (D.C. Cir. 1983). The Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached a different view had the matter been before it *de novo*. *See AFGE Local 2441 v. FLRA*, 864 F.2d 178, 184 (D.C. Cir. 1988); *see also LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997).

Finally, as the Supreme Court has stated, the Authority is entitled to "considerable deference when it exercises its 'special function of applying the

general provisions of the [Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

SUMMARY OF ARGUMENT

1. After litigating this case both before an arbitrator and the Authority, NTEU petitions this Court to review the Authority's decision based on a theory of the case never articulated in the earlier proceedings. Absent extraordinary circumstances, § 7123(c) of the Statute deprives a reviewing court of jurisdiction to consider objections not urged before the Authority. Because NTEU's petition for review is predicated entirely on arguments never urged before the Authority, and because no extraordinary circumstances are present, the petition should be dismissed for lack of jurisdiction.

2. Even assuming that NTEU's contentions are properly before this Court, they are without merit. The Authority's decision in this case represents a reasonable interpretation of the relevant provisions of the Statute and is supported by substantial evidence.

A. In finding that Customs provided adequate notice to NTEU, the Authority

applied standards established in its own precedent and consistent with private sector practice. These standards require an employer to provide advance notice of changes in conditions of employment that informs the union of the scope and nature of the proposed change, the certainty of the change, and the planned timing of the change. These reasonable standards provide an objective test for determining whether an

employer has provided a union with sufficient information to make reasonable decisions concerning bargaining.

Customs' notice clearly satisfies the relevant standards. NTEU's claim that the Authority erred by adhering to these standards, and not considering other factors, including the state of mind of a union representative and circumstances that may have contributed to that state of mind, lacks authoritative support. Accordingly, the Authority properly determined that the arbitrator erred when he deviated from the established standards to find that Customs' notice to NTEU was not adequate.

B. NTEU erroneously relies on this Court's decision in *Patent Office Professional Association v. FLRA*, 872 F.2d 451 (D.C. Cir. 1989) (*POPA*). NTEU cites *POPA* to support its newly raised contention that by filing a grievance, NTEU preserved its bargaining rights. *POPA* did not hold that filing a grievance or ULP charge is sufficient by itself to preserve bargaining rights. Rather, the union's entire course of action must be considered. Moreover, unlike the ULP charge in *POPA*, NTEU's grievance did not seek to preserve its bargaining opportunity over the new boarding practice. Rather, NTEU's grievance sought a return to the prior practice and back pay for all impacted employees.

C. NTEU's futility argument is also meritless. In particular, Authority case law cited by NTEU does not support NTEU's contention that its failure to make a bargaining request should be excused because any such request would have been futile. None of the factors the Authority has found to be indicative of futility are present in the instant case. This is not a case where, for example, the agency failed to provide notice of the change reasonably in advance of its proposed implementation date and well before notice was provided to employees. Additionally, unlike other cases where futility has been found, there is no evidence here that a Customs representative ever informed NTEU that a request to bargain

would not be honored. Instead, Customs' notice provided a point of contact for the union to initiate discussions over the change. Finally, NTEU's contention that futility was evident because the notice implied that the change was a "fait accompli" misapplies relevant federal and private sector precedent. In sum, nothing in the record of this case supports a finding of futility.

Accordingly, the petition for review should be dismissed for lack of jurisdiction. Alternatively, assuming *arguendo* that the Court finds jurisdiction, the petition for review should be denied on its merits.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THE INSTANT PETITION BECAUSE PETITIONER'S CONTENTIONS WERE NOT URGED BEFORE THE AUTHORITY AS REQUIRED BY 5 U.S.C. § 7123(c)

A. Section 7123(c) bars a court from considering contentions raised for the first time in a petition for review

Section 7123(c) of the Statute provides, as here pertinent, that "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. §§ 7123(c). In *EEOC*, 476 U.S. at 23, the Supreme Court explained that the purpose of this provision is to ensure "that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." Accordingly, absent extraordinary circumstances, contentions not urged before the Authority, but instead raised for the first time in a petition for review of the Authority's decision, are not

within the Court's jurisdiction to consider. *E.g. United States Dep't of Commerce v. FLRA*, 7 F.3d 243, 244-45 (D.C. Cir. 1993).

B. NTEU's contentions in its petition for review were not raised in proceedings before the Authority

The contentions on which NTEU bases its challenge to the Authority's decision in this case are made for the first time in its brief to this Court. NTEU makes three arguments. First, NTEU asserts that the Authority erroneously ruled that Customs's notice to NTEU of a change in working conditions was adequate, because the Authority did not consider the "surrounding context in which the Union received it." *See*, *e.g.*, NTEU's brief (Br.) at 12, 14, 22-24. Second, NTEU argues that its bargaining rights were not waived because by filing a grievance over the matter, it sought to preserve those bargaining rights. *See*, *e.g.*, Br. at 12, 19-22. Finally, NTEU contends that it was not required to request bargaining to preserve its rights, because such a request would have been futile. *See*, *e.g.*, Br. at 12-13, 24-28.

None of NTEU's contentions in its petition for review were raised in the proceeding before the Authority. In that proceeding, Customs filed exceptions to the arbitrator's award (Supplemental Appendix (SA) 1-16), and NTEU filed an opposition to Customs' exceptions (SA 16-39). Nowhere in the case's record before the Authority is there any discussion whatsoever of the contentions NTEU now urges on the Court concerning preservation of its bargaining rights through the filing of a grievance, or futility (the second and third arguments identified in the preceding paragraph).

Further, although Customs discussed the subject of "adequate notice" in its exceptions, it did so only to assert that the notice provided to NTEU was adequate under Authority case law. SA 7-11. NTEU's opposition does not address the substance of the agency's argument. Rather, as the Authority found, "[NTEU] confines its response on the [adequate notice] point to the claim that the Agency's arguments constitute a simple disagreement with the Arbitrator's decision." JA 122. *See* SA 34-35.

In sum on this point, the contentions made by NTEU in its brief represent an effort by the union to substitute this Court for the Authority. Section 7123(c) anticipates that a court will not address issues arising under the Statute in the first instance, but rather will review the Authority's determination. *See United States Dep't of Defense, v. FLRA*, 982 F.2d 577, 580 (D.C. Cir. 1993). In this case, the Authority had no opportunity to bring its administrative expertise to bear on the resolution of the issues raised before this Court by NTEU because the issues were never raised before the Authority. *See Id.* (Authority cannot be expected to pass on issues not coherently raised before it). Thus, the Court has nothing to review. Accordingly, there being no extraordinary circumstances to excuse NTEU's failure to raise its contentions below, the Court should dismiss NTEU's petition for review for lack of jurisdiction.

II. ASSUMING THE COURT HAS JURISDICTION OVER THE PETITION FOR REVIEW, THE AUTHORITY PROPERLY SET ASIDE AN ARBITRATOR'S AWARD

A. The Authority applied well-established standards and reasonably determined that Customs' notice to NTEU was adequate to provide NTEU with an opportunity to request bargaining

It is well settled in both the federal and private sectors that a union may waive its right to bargain when it fails to request bargaining after an employer has given it sufficient notice of a proposed change in conditions of employment. *Corps of Engineers*, 53 F.L.R.A. at 82; *Bureau of Engraving and Printing, Washington, D.C.*, 44 F.L.R.A. 575, 582 (1992); *NLRB v. Okla. Fixture Co.*,79 F.3d 1030, 1036-37 (10th Cir. 1996) (*Okla. Fixture*); *YHA, Inc. v NLRB*, 2 F.3d 168, 173 (6th Cir. 1993) (*YHA*). Once an employer provides a union with adequate advance notice of an impending change in conditions of employment, the onus is on the union to request bargaining. *Okla. Fixture*, 79 F.3d 1037. Failure to do so waives a union's right to bargain over the matter. *Id.*

At issue before the Authority was the arbitrator's decision that Customs' notice was not adequate to give rise to an obligation on NTEU's part to request bargaining. Applying well-established standards for determining the adequacy of notice, the Authority held that the arbitrator's decision was in error. As we demonstrate immediately below, the Authority's standards are reasonable and consistent with those applied in the private sector. In addition, the Authority reasonably applied these standards to the facts of this case.

1. The *Corps of Engineers* standards are reasonable

In *Corps of Engineers*, the Authority reviewed its pertinent case law and summarized the standards for adequate employer notice of changes in conditions of employment that the Authority had employed in earlier cases. In general, such notice must be "sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining." *Corps of Engineers*, 53 F.L.R.A. at 82. More specifically, the notice must apprise the exclusive representative of the scope and nature of the proposed change, the certainty of the change, and the planned timing of the change. *Id.* The employer agency bears the burden of establishing sufficient and adequate notice. *Id.* at 82-83.

These standards are reasonable on their face. They provide an objective test for determining whether an employer has put a union on notice that a specific change in conditions of employment is about to take place, and for determining whether the employer has provided the union with enough information to make reasonable bargaining proposals. In this regard, the standards do not address the form of the notice, but rather the notice's content. Further, these standards have long been the basis for Authority determinations in cases like the instant one where a union waiver of bargaining rights is asserted as a defense. *See, e.g., Internal Revenue Serv. (Dist., Region and Nat'l Office Unit and Serv. Ctr. Unit)*, 10 F.L.R.A. 326, 340 (1982) (*IRS*); *Ogden Air Logistics Ctr., Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 41 F.L.R.A. 690, 698-99 (1991). These standards are also consistent with those applied in the private sector. *See Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983) (Board's

reasonable interpretation of the NLRA requires detailed notice, but will permit unilateral implementation where changes are fully described to union before implementation).

2. The Authority properly applied the *Corps of Engineers* standards in this case

The Authority properly applied these standards to the instant case. It is not disputed that Customs' notice of April 1, 1999, satisfied the *Corps of Engineers* standards. The notice informed NTEU of the precise nature of the change - the cessation of overtime vessel boarding; the reason for the change - budgetary constraints; and the effective date of the change - on or after April 15, 1999, to continue for the duration of the fiscal year. In addition, the notice provided the name of a contact should NTEU have questions or "wish to discuss" the matter. JA 9-10. *See American Buslines, Inc.*, 164 N.L.R.B. 1055 (1967) (noting similar language in employer notice to the union). The letter clearly put NTEU on notice of the change in conditions of employment and specifically invited discussion of the matter.

NTEU's claim that the Authority erred as a matter of law by adhering to the *Corps of Engineers* standards, and not considering "the surrounding context," is baseless in the circumstances of this case. In particular, NTEU fails to cite any authority requiring consideration of the state of mind of a union representative or of circumstances that may have contributed to that state of mind, where otherwise adequate notice of a change in conditions of employment has been rendered by an employer. Accordingly, the Authority properly rejected the arbitrator's deviation from the established standards based on NTEU's president's confused state of mind. Additionally, NTEU's suggestion (Br.23) that among the surrounding circumstances was an active plan on the part of Customs management to mislead

NTEU about the intent of Customs' notice is without foundation in the record. For these reasons, NTEU's claims concerning the correct legal standard for determining adequate notice are meritless, and should be rejected.

B. NTEU's grievance did not preserve its right to bargain

Contrary to NTEU's newly raised contentions (Br. 15-24), its filing of a grievance was insufficient to preserve any bargaining rights the union may have had. NTEU relies exclusively on this Court's decision in *Patent Office Professional Association v. FLRA*, 872 F.2d 451 (D.C. Cir. 1989) (*POPA*). NTEU's reliance on *POPA* is misplaced because it misconstrues the Court's decision and, in any event, the facts in this case are distinguishable from those *POPA*.

POPA does not hold that the filing of a ULP charge, in and of itself, is sufficient to preserve a union's bargaining rights. *Cf. Okla. Fixture*, 79 F.3d at 1037 ("The filing of an unfair labor practice charge does not relieve the Union of its obligation to request bargaining."). In holding that the union preserved its bargaining rights, the Court in *POPA* relied on an entire course of action taken by the union, not merely the filing of a ULP charge. The union in *POPA* responded to notice of a change in official time procedures by meeting with agency officials and requesting that the change be delayed until questions about its legality were resolved. 872 F.2d at 453. After the agency refused the request and implemented the change, the union filed an unfair labor practice charge. *Id.* at 453-54. The Court first held that the union's protest to the agency and request to delay the change pending legal inquiries "did not waive its right to bargain as much as initiate it." *Id.* at 455. In addition, the Court found the filing of the ULP charge particularly significant to the preservation of

bargaining rights because the remedy available to the union pursuant to the ULP charge was an order to bargain. *Id.* at 455-56.

This case is distinguishable from *POPA* because NTEU's filing of the grievance lacks the salient feature of the ULP charge in *POPA.* Unlike the ULP charge in *POPA*, NTEU's grievance did not seek to preserve its bargaining opportunity regarding the change in vessel boarding policy by obtaining a bargaining order from the arbitrator. Rather, the principal remedies sought were: 1) a return to the practice of boarding all vessels or, alternatively, implementation of the local and National agreements on vessel boarding; and 2) back pay for all impacted employees. JA 11, 67. It is evident, therefore, that unlike the ULP charge in *POPA*, NTEU's grievance was not intended to preserve bargaining rights, but rather was an attempt to prevent implementation of Customs' change in boarding policy. Accordingly, *POPA* does not support NTEU's theory that its grievance was an effective substitute for a bargaining request.

C. NTEU has not demonstrated that a request to bargain would have been futile

NTEU's argument that its failure to make a bargaining request should be excused because any such request for bargaining would have been futile is also meritless. A failure to request bargaining may be excused when to do so would be clearly futile. However, the general rule is that "futility should not lightly be presumed" where it is being asserted as an exception to what would otherwise be a legal obligation. *Cf., Washington Ass'n for Tel. & Children v. FCC,* 712 F.2d 677, 682 n.9 (D.C. Cir. 1983) (discussing "futility" as an excuse for not satisfying an exhaustion of remedies requirement). Contrary to NTEU's contentions, the record in

this case does not support the conclusion that a request to bargain would have been futile.

Authority precedent, including those cases cited by NTEU, reveal a number of indicia of futility. For example, futility will be inferred where the employer has expressly informed the union that it would not honor a bargaining request. *See Dep't of Defense, Dep't of the Navy, Consol. Civilian Pers. Office*, 1 F.L.R.A. 717, 728 (1979) (employer informed union that the subject matter of change not negotiable); *see also United States Dep't of Labor, Washington, D.C.*, 44 F.L.R.A. 988, 1008 (1992) (*Dep't of Labor*) (same); *United States Dep't of the Navy, Navy Avionics Ctr., Indianapolis, Ind.*, 36 F.L.R.A. 567, 572 (1990) (employer asserted that no change to conditions of employment occurred). Futility may also be found where notice of a change in working conditions is made to affected employees without notice to the union. *See Dep't of Labor*, 44 F.L.R.A. at 1008; *see also United States Dep't of Interior, Bureau of Reclamation*, 20 F.L.R.A. 587, 599 (1985).

Correctly applying the precedent cited immediately above, the facts in the instant case do not support the conclusion that a bargaining request would have been futile. First, NTEU's designated union representative was provided reasonable advance notice. A formal notice to affected employees, a common indicia that a final decision has been implemented, was not issued until April 13, 1999, almost 2 weeks after notice to the union. JA 84. Second, there was no express communication from Customs to NTEU that a request to bargain would be refused. Although Area Director Kathleen Haag testified (JA 90) that she believed the decision to cease boarding was a nonnegotiable budget decision, there was no testimony that NTEU was ever informed that a request to bargain the change, or its impact, would not be honored. Third, the advance notice specifically invited NTEU to discuss the matter.

Accordingly, NTEU's reliance on Authority precedent to support its contention that a bargaining request would have been futile is misplaced.

Finally, NTEU's contention (Br. 26-27) that futility was evident because the notice implied that the change in boarding practice was a "fait accompli" is meritless. Specifically, NTEU's reliance on the fact that the notice was unequivocal, rather than stating, for example, "that the change was being considered," misapplies the relevant law. Unequivocal assertions that a change will go in effect are not indicia that a bargaining request would be futile in cases like this one, where the union has been provided advance notice of the change. *Haddon Craftsmen, Inc.*, 300 N.L.R.B. 789, 790 (1990) (*Haddon Craftsmen*) To the contrary, adequate notice must be unqualified and not conditional. *IRS*, 10 F.L.R.A. at 340; *Dep't of Labor*, 44 F.L.R.A. at 1008.[5]

Although NTEU may have believed that it was unlikely that the decision to eliminate boarding on overtime would be reversed, there is no objective evidence that Customs would have been averse to bargaining the impact and implementation

[5] In this regard, NTEU misapplies a quote from *Dep't of Labor* (Br. 27) when it suggests that, in that case, the Authority interpreted a manager's statement that a change in parking fees was "going to happen" as indicative of a "fait accompli." Quite the opposite, the manager's statement was part of a conversation about what was going to happen sometime in the indefinite future and, in that context, the Authority found such a statement so vague as to be "neither sufficient nor adequate to meet the statutory obligation to give notice." *Id.* As discussed above, the finding of futility in *Dep't of Labor* was based on another factor, *i.e.*, the manager's express statement that the issue was nonnegotiable. *Id.*

(effects) of the change.[6] In these circumstances, the record does not support a finding of futility.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction. Assuming the Court has jurisdiction, the petition for review should be denied on its merits.

Respectfully submitted,

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

JAMES F. BLANDFORD
Attorney

Federal Labor Relations Authority
607 14th Street, NW
Washington, D.C. 20424
(202) 482-6620

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[6] *See Haddon Craftsmen*, 300 N.L.R.B. at 790. The National Labor Relations Board requires objective evidence of futility, such as informing the union that bargaining will be futile or implementing changes before or contemporaneously with notification to the union. *Id.* A union official's subjective impression that a request to bargain will be futile is insufficient. *Id.*

GLOSSARY

Add.	Addendum
Br.	brief
cba	collective bargaining agreement
Corps of Engineers	*United States Army Corps of Engineers, Memphis District, Memphis, Tenn.*, 53 F.L.R.A. 79 (1997)
Customs	United States Customs Service
Dep't of Labor	*United States Dep't of Labor, Washington, D.C.*, 44 F.L.R.A. 988 (1992)
EEOC	*Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19 (1986)
FLRA or Authority	Federal Labor Relations Authority
Haddon Craftsmen	***Haddon Craftsmen, Inc.*, 300 N.L.R.B. 789 (1990)**
JA	Joint Appendix
National MOU	**National Memorandum of Understanding**
NTEU	**National Treasury Employees Union, Chapter 161**
Okla. Fixture	***NLRB v. Okla. Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996)**
POPA	*Patent Office Professional Association v. FLRA*, 872 F.2d 451(D.C. Cir. 1989)
SA	**Supplemental Appendix**
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
ULP	unfair labor practice

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 161, Petitioner	)	
v.	)	No. 02-1153
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

SERVICE LIST

I certify that copies of the Brief and Supplemental Appendix for the Federal Labor Relations Authority have been served this day, by mail, upon the following:

Gregory O'Duden, General Counsel
Kerry L. Adams, Associate General Counsel
Robert H. Shriver, III, Assistant Counsel
National Treasury Employees Union
901 E Street, NW, Suite 600
Washington, D.C. 20004

Thelma Brown
Paralegal Specialist

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